

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO.49 OF 2017

- 1) Abhiman Bhimrao Suryawanshi
Deceased through L.Rs.,
 - 1/A) Rajendra @ Mitu Abhiman Suryawanshi
Deceased through L.Rs.,
 - 1/A-a) Archana Rajendra Suryawanshi
Age : 35 years, Occ : Household,
R/o Sanja, Tq. & Dist. Osmanabad.
 - 1/A-b) Mayuri Rajendra Suryawanshi
Age : Minor, Occ : Education,
R/o As above.
 - 1/A-c) Priya Rajendra Suryawanshi
Age : Minor, Occ : Education,
R/o As above.
 - 1/A-d) Yash Rajendra Suryawanshi
Age : Minor, Occ : Education,
R/o As above.
 - 1/A-e) Shivraj Rajendraa Suryawanshi
Age : Minor, Occ : Education,
R/o As above.
- Appellants Nos.1/A-b to 1/A-3
Minor, through natural guardian i.e.
Appellant No.1/A-a namely
Archanaa Rajendra Suryawanshi
Age : 35 years, Occ : Household,
R/o Sanja, Tq. & Dist. Osmanabad.
- 1/B) Vilas S/o Abhiman Suryawanshi
Age : 42 years, Occ : Agri.,
R/o Sanja, Tq. & Dist. Osmanabad.

- 1/C) Sau. Lata W/o Sampat Kadm
Age : 49 years, Occ : Household,
R/o As above.
- 1/D) Anu @ Anita D/o. Abhiman Suryawanshi
Age : 44 years, Occ : Household,
R/o As above.
- 1/E) Kaushalyabai W/o Abhiman Suryawanshi
Age : 64 years, Occ : Household,
R/o As above (died)
- 1/F) Nagarbai W/o Bhimrao Suryawanshi
Deceased.
- 2) Dhanu S/o Shrimant Suryawanshi
Age : 51 years, Occ : Agri.,
R/o As above.

..APPELLANTS
(Orig. Defendants)

VERSUS

Dagadu S/o Changdev Khune
Age : 71 years, Occ : Agri.,
R/o Bhatambra, Tq. Barshi,
Dist. Solapur.

..RESPONDENT
(Orig. Plaintiff)

...
Mr. A.N. Nagargoje, Advocate for appellant.
Mr. A.R. Deokate, Advocate for respondent.

...

CORAM: V.L. ACHLIYA, J.
DATED : 23.01.2020

JUDGMENT:

. The appellants – original defendants
have preferred this appeal under Order XLIII

Rule (1)(u) of the Code of Civil Procedure (Hereinafter referred to as "the Code") against the order of remand of case passed by the learned District Judge-3, Osmanabad in Regular Civil Appeal No.243/2013 dated 23.06.2017, arising out of the judgment and decree dated 06.12.2012 passed by the learned Incharge Joint Civil Judge, Junior Division, Osmanabad in Regular Civil Suit No.335/1987.

2. Heard the learned counsel for the appellants and learned counsel representing the respondent. Perused the judgment and order passed by the Lower Appellate Court remanding the case to trial Court for fresh decision.

3. The learned counsel for the appellants assailed the impugned judgment and order of remand of the case passed by Lower Appellate Court with contention that the

reasons recorded by the Lower Appellate Court in allowing appeal and remanding the case, are perverse and unsustainable in law. By referring to overall facts of the case, the learned counsel submits that the trial Court has acted well within the scope of exercise of powers vested under explanation clause of Order XVII Rule 2 of the Code to proceed with the case and to decide the same on merits on the basis of evidence already adduced in the case, due to failure on the part of plaintiff to appear and prosecute the suit. It is submitted that though the plaintiff has filed the suit on 19.08.1987 and the first witness for the plaintiff examined on 31.03.1995, the plaintiff failed to step into witness box and lead further evidence. In the circumstances, the trial Court has closed the evidence of plaintiff and proceeded to decide the case on merit by impugned judgment and order dated 06.12.2012. It is submitted that while

proceeding with the case, the trial Court has considered the evidence as adduced in the case sufficient to decide the case on merit. In that view, there was no mistake on the part of the trial Court to proceed as per explanation provided to Rule 2 of Order XVII of Code and decide the case on merit. It is further submitted that in the facts and circumstances of the case, the order of remand after 30 years of institution of suit is not sustainable in law.

4. On the other hand, learned counsel for the respondent supported the judgment and decree passed by the Lower Appellate Court. By referring to overall facts of the case and the reasons and findings recorded by the Lower Appellate Court, the learned counsel submits that the judgment and decree passed by the Lower Appellate Court suffers from no perversity so as to call for interference in

exercise of appellate powers under Order XLIII Rule 1(u) of the Code. It is pointed out that the trial Court has proceeded with the suit and decided the suit on merit though the plaintiff has not stepped into witness box and substantial/sufficient evidence to decide the case on merit available in the case. It is submitted that in the facts and circumstances of the case, only option available with the trial Court to dismiss the suit in exercise of powers vested under Order XVII Rule 2 of the Code for want of prosecution as the plaintiff as well as defendant remained absent when suit was called out for hearing. It is submitted that in order to take recourse to explanation to Rule (2) of Order XVII of Code, the Court has to first satisfy itself that; (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one

to which the hearing of the suit is adjourned. It is submitted that no eventuality as contemplated under explanation to Rule 2 of Order XVII of Code existed to proceed to exercise juridical discretion and decide the suit on merit. The only course available for the trial Court either to adjourn the hearing of the suit to subsequent date or to dismiss the suit by taking recourse to Order XVII Rule 2 by following course prescribed under Order IX Rule (3) of Code. In that view, the judgment and decree passed by the trial Court is *per se* illegal, perverse and not sustainable in law. On reaching to such conclusion that the judgment and order passed by the trial Court is not sustainable in law the Lower Appellate Court has set aside the judgment and decree passed by trial Court and remanded the case for fresh decision. In that view, neither there is any perversity nor the appeal raises any

grounds as contemplated under section 100 of the Code to entertain the appeal. The learned counsel in support of submissions advanced referred and relied upon the decision of the Apex Court in the case of *B. Janakiramaiah Chetty V/s A.K. Parthasarathi and other* reported in (2003)5 SCC 641, *Narayanan V/s Kumaran and others* reported in (2004) 4 SCC 26, *Jegannathan V/s Raju Sigamani and another* reported in (2012) 5 SCC 540 and *Mohandas and others V/s Ghisia Bai and others* reported in 2002 AIR SCW 2675.

5. On due consideration of submissions advanced in the light of overall facts of the case, the reasons and findings recorded by the Lower Appellate Court and scope of exercise of judicial discretion noted under explanation to Rule 2 of Order XVII of Code, I am of the view, the appeal preferred by the appellants lacks in merit. So also it raises

no grounds enumerated under Section 100 of the Code to entertain the appeal.

6. The respondent – plaintiff had filed Regular Civil suit No.335/1997 seeking decree of declaration, injunction and possession in respect of the suit land. Plaintiff has claimed that the defendant has created a bogus sale deed in respect of suit property by impersonation. He sought declaration to effect that the sale deed dated 29.09.1986 shown to be executed by the plaintiff in favour of the defendant be declared as false, fabricated document and further declare the plaintiff as the owner and in possession of suit property. He has further claimed relief of permanent injunction.

7. It appears from the record that the plaintiff has not stepped into the witness box till the decision in the suit. In the

year 1995, the plaintiff has examined one witness i.e. the Finger Print expert with the leave of Court obtained under Order XVII Rule 2 of the Code. Although the case repeatedly adjourned for recording the evidence of plaintiff and his witnesses, the plaintiff failed to appear and adduce evidence in support of his case. Ultimately trial Court has closed the evidence and proceeded to decide the suit on merit on the basis of available evidence. By judgment and order dated 6th December, 2012, decided the suit on merit and dismissed the same. Aggrieved by said judgment and decree passed by the trial Court, the respondent-plaintiff preferred appeal before the Lower Appellate Court under Section 96 of the Code. The Lower Appellate Court vide judgment and order dated 23.06.2017 pleased to allow the Regular Civil Appeal No.243/2013 preferred by the respondent – plaintiff and set aside the

judgment and decree passed by trial Court on reaching to the conclusion that the trial Court has committed serious error in law to proceed with the suit and decide the same on merit in absence of any substantial evidence adduced in the case. The Lower Appellate Court has reached to the conclusion that in absence of substantial evidence, the judgment and decree passed is perverse and not sustainable in law and remanded the case to trial Court for deciding the same afresh after providing opportunity of hearing to the parties by imposing costs of Rs.10,000/- to be payable by the plaintiff to the defendants. Being aggrieved, the appellants-original defendants preferred this appeal.

8. In my view, there is absolutely no illegality nor any perversity in the judgment and decree passed by Lower Appellate Court in remanding the case to trial Court. It is an

admitted position that on 06.12.2012, the date on which the Court proceeded to decide the case on merit, neither the plaintiff nor the defendants were present. So also there is no dispute as to fact that on earlier date the Court proceeded to close the evidence as plaintiff failed to appear and adduce evidence. There is no dispute that the plaintiff has not stepped into the witness box on and before 6/12/2012 nor examined any other witness. Except the evidence of Finger Print expert no other witness examined in the case. In that view, the question poses for consideration, the trial Court was justified to decide the suit on merit by taking recourse to explanation to Rule 2 of Order XVII of Code. The Rule (2) and (3) of Order XVII of the Code reads as under :-

"2. procedure if parties fail to appear on day fixed- Where, on any day to which the hearing of suit is

adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation – Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

(3) Court may proceed notwithstanding either party fails to produce evidence, etc.-*Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,-*

(a) if the parties are present,

*proceed to decide the suit forthwith;
or*

*(b) if the parties are, or any of
them is, absent, proceed under rule
2."*

9. Thus rule 2 of Order XVII provides for the course to be adopted by Court if parties to suit or any one of them failed to appear on that fixed date for hearing of suit. In the event both the parties or any one of them failed to appear, the Court may proceed and dispose of the suit by adopting one of the mode provided under Order IX of Civil Procedure Code or to make such order deem fit and proper including order to adjourn the case on such time as deem fit and proper. Rule 3 of Order IX of the Code empowers the Court to dismiss the suit where neither parties appears when the suit is called for hearing. Therefore, the proper course available before the trial Court either to proceed under Rule (3) of Order IX

of the Code and dismiss the suit or adjourn the same by recording the absence of parties. Explanation to rule 2 of Order XVII provides eventuality wherein the Court instead of dismissing suit may decide the suit on merit if satisfied that the evidence recorded is more than sufficient or substantial in nature to decide the case. It is a sort of discretion vested with Court to proceed and decide the case on merit in absence of party if such party fails to appear on date fixed for hearing and evidence adduced in the same found to be substantial enough to decide the case on merit. However, such judicial discretion vested with the Court is not absolute but guided by sound principles.

10. The scope of exercise of judicial discretion provided under explanation to Rule (2) of Order XVII of Code has been considered and discussed by Apex Court in the case of **B.**

Janakiramaiah Chetty (supra), wherein in paras 8, 9 and 10 the Apex Court has observed as under :-

"8. The Explanation permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the court is to be exercised in a given circumstance. For application of the provision, the court has to satisfy itself that: (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the court may in its discretion

deem as if such party was present. Under Order 9 Rule 3 the court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are "proceed with the case". Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the court or not.

9. In Rule 2, the expression used is "make such order as it thinks fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes

mentioned in the rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the court to decide the suit forthwith. The basic distinction between the two rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It

cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision."

11. Thus in order to exercise the judicial discretion vested with Court under explanation to rule 2 of Order XVII of Code, there must be satisfaction on the part of the Court that the substantial portion of evidence of any party has been already recorded and such party has failed to appear on the day fixed for hearing of the suit. In the instant case, no such situation appears to have existed to justify the trial Court to exercise its judicial discretion vested under explanation to rule 2 of Order XVII of the Code. In the judgment and decree passed by the trial Court itself, the Court has observed that no sufficient evidence adduced by plaintiff to prove his case and decide the

issues on merit. In that view, the Court wrongly exercised the judicial discretion and proceeded to decide the case on merit without satisfying the existence of substantial evidence to decide the case on merit. In that view, the Lower Appellate Court perfectly justified in remanding the case for fresh decision to trial Court.

12. In an appeal filed under Order XLIII Rule 1(u) of the Code, the appellants are not entitled to agitate the question of facts. The challenge to such order of remand must be based upon grounds enumerated under section 100 of the Code i.e. existence of substantial questions of law. In this context, it is useful to refer the decision of the Apex Court in the case of ***Narayanan V/s Kumaran and others (supra)***, wherein in para 17, the Apex Court has observed as under:-

"17. It is obvious from the above rule that

an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43 Rule 1 clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr T.L.V. Iyer and hold that the appellant under an appeal under Order 43 Rule 1 clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate court."

13. Similarly in the case of *Jagannathan V/s Raju Sigamani and another (supra)* the Apex Court has reiterated the law laid down in the case of *Narayanana V/s Kumaran and*

others (supra) and observed in paragraph nos.10 and 11 as under :-

"10. Order 43 of the Code provides for appeals from orders. Clause (u) of Rule 1 Order 43 was amended consequent upon insertion of Rule 23-A in Order 41 w.e.f. 1-2-1977. It reads as under:

"1. Appeals from orders.—An appeal shall lie from the following orders under the provisions of Section 104, namely—

* * *

(u) an order under Rule 23 or Rule 23-A of Order 41 remanding a case, where an appeal would lie from the decree of the appellate court;"

It is clear from the above provision that an order of remand passed under Order 41 Rule 23-A is amenable to appeal under Order 43 Rule 1(u) of the Code.

11. The High Court relied upon a decision of this Court in *Narayanan v. Kumaran* in holding that civil miscellaneous appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in *Narayanan* is that an appeal under Order 43 Rule 1(u) should be heard only on the ground enumerated in Section 100 of the

Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100."

14. Thus in the light of overall facts of the case, the only course which was available before the trial Court either to adjourn the hearing of the suit to subsequent date or to dismiss the suit by adopting the recourse available under Rule 3 of Order IX of the Code in view of absence of both the parties to the suit. In absence of evidence of substantial in nature available on record to decide the case on merit, the trial Court committed serious error in law to proceed with the suit and decide the same on merits in absence of parties. The trial Court has wrongly exercised its judicial discretion vested under explanation to rule 2 of Order XVII of the Code. In that view, the order of remand of case passed by lower appellate

Court fully justified and sustainable in law. There is absolutely no perversity in the judgment and order passed by the Lower Appellate Court. So also appeal raises no grounds as enumerated under Section 100 of the Code to entertain the appeal under Order XLIII Rule 1(u) of the Code. In the result the appeal deserves to be dismissed as devoid of merit. Hence the following order :-

ORDER

- (i) The appeal is dismissed.
- (ii) Civil application pending stands disposed of in terms of order passed in appeal.

**[V.L. ACHLIYA]
JUDGE**